IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

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NICOLE LOUISE MOORE (PIERC	CE), *	
	*	4-00-CV-90166
Plaintiff,	*	
	*	
V.	*	
	*	
UNITED STATES OF AMERICA,	et al., *	
	*	MEMORANDUM OPINION
Defendants.	*	AND ORDER
<u> </u>	*	

The Plaintiff, Ms. Moore, brought this action against the United States for negligence and negligence per se related to her medical treatment at a Veteran's Administration ("VA") health facility. The United States moved, unresisted, for judgment on the pleadings with respect to the negligence per se claim and this Court dismissed the claim without prejudice instead. The United States now moves for summary judgment and for the foregoing reasons, the motion is granted with respect to the damage claims of lost income and earning capacity, and denied otherwise.

I. Facts

Ms. Moore is a veteran of the United States Air Force who, up to August 1997, regularly received medical care at a VA health facility in Knoxville, Iowa. On August 14, 1997, the VA doctor treating Ms. Moore for an unrelated condition, Dr. Akella, recommended that she receive a tetanus booster shot. Ms. Moore reluctantly agreed and offered to return from another medical appointment for the injection. Upon returning, Ms. Moore was instructed to go to the nurse's station where she alleges that she watched the nurse who was treating her, later identified as

Maureen Campbell, walk over to a stainless steel cabinet where the hypodermic needle (syringe) was sitting. Ms. Moore testified at her deposition that the syringe was resting on the cap, and that the needle was not touching anything. Ms. Campbell then picked up a package of swabs, opened it, swabbed Ms. Moore's arm, and gave her the injection. Ms. Moore claims she did not see Ms. Campbell put the vaccine in the syringe, it was already made up when she arrived at the nurses' station. Ms. Moore did not see Ms. Campbell touch the end of the needle, rub it on her skin, or rub it on anything. According to Ms. Moore, a bandage was not placed on the injection site and she was not advised in any way on keeping it clean.

Ms. Moore's arm was sore and tender that night, and she took Motrin, as instructed. Ms. Moore admitted during deposition that she may have placed her hand on her arm in response to the soreness. On August 18, Ms. Moore called the VA and spoke with another nurse. Ms. Moore explained that her arm was swollen and had lumps. She was told to take some Tylenol or Motrin and to call back if there was no improvement. On August 21, Ms. Moore called the VA and spoke with Ms. Campbell, who said she would refer the call to a doctor. Dr. Akella called her the next day and told her what she described was a reaction to the shot and reiterated the instructions about ice and Motrin. He also suggested she come in to have it looked at. Within a few days, Ms. Moore went to the VA and asked to see a doctor, but she was told it would be a three or four hour wait. Rather than remaining at the VA, she elected to see a private physician, Dr. Paul Poncy, on August 25.

Dr. Poncy diagnosed a soft tissue infection which he believed to be either staph or strep and put Ms. Moore on antibiotic. According to Ms. Moore, fluid began to drain from her arm shortly thereafter. On August 27, Ms. Moore called the VA again complaining of redness and

swelling and was told to use cold packs and call back if it lasted more than a week. That day, Ms. Moore saw Dr. Maldonodo at the VA, who noted two red areas that were tender to the touch and no open wounds at that time. On August 29th, Ms. Moore returned to the VA, where she claims Drs. Akella and Maldonado, without coming within six feet of her, diagnosed the problem as just a reaction to the shot. Ms. Moore claims her husband insisted that they take more immediate action, and she was referred to a VA facility in Des Moines. The medical staff at the VA in Des Moines suggested that they perform surgery immediately. They proceeded to surgically open the injection site and irrigated it. By December 1997, a full range of motion had returned to Ms. Moore's arm, although to date she has trouble performing certain repetitive tasks, such as yardwork.

In deposition testimony, Dr. Poncy testified that leaving an uncapped syringe lying in an office exposed to open air is not part of a typical standard operating procedure. Dr. Poncy also testified that one would not expect a staph infection to occur under normal standard operating procedure nor has he seen it happen.

II. Summary Judgment Standard

The purpose of summary judgment is to "pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993). Summary judgment "allows courts and litigants to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to [conserve] scarce judicial resources." *Id.*

The precise standard for granting summary judgment is well-established and oft-repeated:

summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The Court does not weigh the evidence nor make credibility determinations, rather the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *cited in Handeen v. Lemaire*, 112 F.3d 1339, 1345 (8th Cir. 1997); *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. Fed.R.Civ.P. 56(c), (e); *Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis added). An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

III. Discussion

The gravamen of the United States' argument for summary judgment in this case is that Ms. Moore was not able to produce any direct evidence that the hypodermic needle with which she was injected came into contact with any surfaces prone to contain staph bacteria.

Consequently, Ms. Moore is unable to establish the proximate cause element of negligence.

Unfortunately, in their briefing, the United States and Ms. Moore's attorney both ignore a fundamental principle of tort law: *res ipsa loquitur*.

Res ipsa loquitur is a rule of evidence which, when applied, permits but does not compel an inference that the defendant was negligent. Under the doctrine the happening of an injury permits an inference of negligence where plaintiff produces substantial evidence that (1) the injury is caused by an agency or instrumentality under the exclusive control and management of the defendant and (2) the occurrence is such as is in the ordinary course of things would not happen if reasonable care had been used.

Sammons v. Smith, 353 N.W.2d 380, 385-7 (Iowa 1984) (citations omitted). It is now well established that Courts may apply the doctrine of res ipsa loquitur in medical malpractice suits in Iowa. In fact, res ipsa loquitur has been applied in cases with strikingly similar facts to the case at bar. In Welte v. Bello, 482 N.W.2d 437 (Iowa 1992), the Iowa Supreme Court held that a Court erred by failing to apply res ipsa loquitur and granting partial summary judgment for a negligence claim where the plaintiff was burned from an IV injection during surgery.

The Court in Welte quoted its decision in Sammons stating that

"when res ipsa is submitted in a medical malpractice case, the plaintiff is relieved of the burden of showing that specific acts of defendant were below accepted medical standards. The plaintiff still must prove negligence, but he or she does so by convincing the jury the injury would not have occurred absent some unspecified but impliedly negligent act."

Welte at 440. In Welte, the Iowa Supreme Court held that the circumstances of a burn resulting

from an IV injection were sufficient to defeat summary judgment without expert medical evidence. In the case at bar, a doctor testified that he would not expect a patient to get a staph infection if the normal standard operating procedure for giving injections is used. Thus, Ms. Moore has provided more than enough evidence to create a genuine issue of material fact as to whether she can establish the VA was negligent under *res ipsa loquitur*. Furthermore, there is certainly a genuine issue of material fact as to whether Ms. Moore's injury was due to an instrumentality exclusively under the control of the United States, the syringe in question.

With respect to Ms. Moore's claim of misdiagnosis, the United States points out that Ms. Moore's own medical expert, Dr. Poncy, testified that "the proper treatment for the early symptoms Plaintiff conveyed to VA staff is exactly what they ordered." While that is true, the United States fails to note that Dr. Poncy testified that after a week, it would be reasonable to ask the patient to see the physician. VA doctors saw Ms. Moore at least once more than a week after the injection without referring her for more appropriate care. Whether or not this was reasonable remains a genuine issue of material fact.

Similarly, the United States argues that because Ms. Moore recovered a full range of motion, she is not entitled to damages. The United States is requesting that the Court conclude as a matter of law that Ms. Moore's inability to perform repetitive tasks is inadequate to prove a "permanent loss of total function" of her arm. The Court is unwilling to do so. Furthermore, the pain and suffering and scarring alone are sufficient damages to allow her claim to go forward. Nonetheless, the government has established that there is no genuine issue of material fact with respect to Ms. Moore's loss of earning capacity or income and for those particular damage claims the Court enters summary judgment.

IT IS SO ORDERED.

Dated this ___11th___ Day of January, 2002.

ROBERT W. PRATT
U.S. DISTRICT JUDGE